

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN SMITH,

Defendant-Appellant.

UNPUBLISHED

June 23, 2000

No. 214099

Wayne Circuit Court

Criminal Division

LC No. 98-001565

Before: Hoekstra, P.J., and Holbrook, Jr., and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of armed robbery, MCL 750.529; MSA 28.797; assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony (hereinafter felony-firearm), MCL 750.227b; MSA 28.424(2). Defendant was sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to concurrent terms of sixteen to forty years' imprisonment for each armed robbery conviction, and five to ten years' imprisonment for the assault with intent to commit great bodily harm conviction. Defendant was also sentenced to serve a consecutive two year prison term for the felony-firearm conviction. We affirm.

Approximately two hours after the armed robbery at issue occurred, the police were investigating an unrelated matter when they received information regarding a vehicle driven by defendant. The police pursued the vehicle, and when it stopped, the passenger exited through the passenger's side window and ran from the scene. Although defendant was ordered to remain in the vehicle, he, nonetheless, exited and began to walk away from the scene. Defendant also ignored a subsequent order to stop. Defendant was then apprehended, and eventually subdued after struggling with the arresting officers. Defendant was originally charged with carrying a concealed weapon in an

automobile, MCL 750.227; MSA 28.424.¹ A search of the vehicle's trunk revealed items taken in the armed robbery. The two victims of the armed robbery later identified defendant as the perpetrator.

Defendant first argues that he was denied a fair trial when the trial court instructed the jury on the issue of flight. We disagree. Defendant failed to object to the giving of this instruction. Accordingly, we review this issue under the plain error rule. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice" *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error ""seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."" *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

The trial court gave the following instruction to the jury on the issue of flight:

There has been some evidence that the defendant tried to run away after—when the police were attempting to arrest him. This evidence does not prove guilt. A person may run or hide for innocent reasons such as panic, mistake, or fear. However, a person may also run or hide because of a consciousness of guilt. You must decide whether the evidence and [sic] true, and if true, whether it showed the defendant had a guilty state of mind.²

Defendant's assertion that there must be evidence that defendant had been accused or confronted with the charge of armed robbery at the time is without merit. CJI2d 4.4 contemplates several different scenarios, including when a defendant attempts to flee when the police are trying to arrest him. That is the version of the instruction given to defendant's jury, and we believe that such an instruction is supported by the facts of the case. The undisputed evidence showed that defendant attempted to walk away from the scene after first having been ordered to remain in his vehicle, and then being ordered to stop after he had exited the vehicle. The evidence also established that defendant struggled with the police after being physically apprehended. We also reject defendant's attempt to draw a distinction based on the speed with which he was moving. The evidence was such that a reasonable trier of fact could conclude that by walking away from the officers, defendant was attempting to flee arrest. Accordingly, we see no error, plain or otherwise, in the giving of the flight instruction. Therefore, we conclude that the issue is forfeited. *Carines, supra* at 772.

¹ The police officer who subdued defendant testified that he passed by the open driver's side door of the vehicle as he pursued defendant. As he did, the officer spotted a "very large revolver laying on the driver's seat."

² This instruction is modeled after CJI2d 4.4.

Defendant next argues that he is entitled to resentencing for the reason that the court amended the original judgment of sentence to sentence him as an habitual offender without benefit of notice or a hearing. We disagree. At sentencing, the court determined the existence of defendant's prior convictions during a discussion of the scoring of the guidelines for the underlying offense of armed robbery. Defendant confirmed the existence of the convictions by his own statement. See MCL 769.13(5); MSA 28.1085(5). The court then sentenced defendant within the guidelines for armed robbery, the most serious underlying offense. *People v Brewersdorf*, 438 Mich 55, 66; 475 NW2d 231 (1991). The length of the terms imposed did not change when the court amended the judgment of sentence. The only change made was to show that the sentences imposed reflected enhancement under the habitual offender statute. We believe the entry of an amended judgment to reflect defendant's status as an habitual offender did not require a new sentencing hearing. *People v Green*, 228 Mich App 684, 700; 580 NW2d 444 (1998).

Affirmed.

/s/ Joel P. Hoekstra

/s/ Donald E. Holbrook, Jr.

/s/ Brian K. Zahra